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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>CLIFFORD ANDREW TOTH,<br>Defendant and Appellant. | A134354<br><br>(Solano County<br>Super. Ct. No. FCR283768) |

## I. INTRODUCTION

In 2009, appellant pled guilty to second degree burglary in San Diego County and was granted probation by that county's superior court. After one probation revocation by that court, in 2011 the case was transferred to the Solano County Superior Court, where a second revocation of probation was ordered and then later reinstated. In October 2011, that court revoked probation again and, after a hearing, sustained the finding of a violation of probation and its revocation. Appellant was, thereafter, sentenced to the two-year midterm for the 2009 offense, albeit with 424 days of custody and conduct credits. Appellant claims the trial court abused its discretion in not reinstating his probation, but we disagree and hence affirm the trial court's orders and the consequent judgment and sentence.

## II. FACTUAL AND PROCEDURAL BACKGROUND

As noted, in 2009 appellant was convicted of second degree burglary (Pen. Code, § 459)[1] for stealing flashlights from a Target store in San Diego County. Prior to that, he had had four previous convictions, one for a felony assault in 2001, and three misdemeanors: battery, being drunk in public, and petty theft and being under the influence of a controlled substance in, respectively, 1995, 1999, and 2004. He was found to have violated probation in all of these cases, except for the 2004 misdemeanor conviction. The San Diego County Probation Officer considered appellant's overall performance while on probation to have been "marginal" and recommended a midterm prison sentence if he was sentenced. However, on January 14, 2010, the San Diego Superior Court granted appellant probation for the burglary conviction, albeit with very strict conditions, i.e., completion of psychiatric evaluation and substance abuse, anti-theft, and alcohol abstention programs.

On April 20, 2010, probation was summarily revoked but, after appellant admitted a probation violation, it was reinstated.

In March 2011,[2] the case was transferred to Solano County Superior Court, after appellant had completed a nine-month residential substance abuse program in Vista, San Diego County, and had moved to Vacaville in Solano County. However, on April 11, he was arrested for public drunkenness. (§ 647, subd. (f).) After being so charged on April 13, appellant pled not guilty but, on April 22, the case was dismissed when the prosecutor opted to move to revoke appellant's probation.

On May 31, the court found that appellant had violated probation by failing to abstain from the use of alcohol, and he was placed on a 72-hour hold under Welfare and Institutions Code section 5150. On June 24, his probation was reinstated and extended three years subject to the prior conditions.

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[1] All further statutory references are to the Penal Code.

[2] Unless otherwise noted, all further dates are in 2011.

On October 7, appellant was tested at his home and displayed objective signs of intoxication; his breath tested at 0.04 blood alcohol content. These effects were traced to a combination of the use of alcohol and his addictive overdose of prescribed medication. Based on this, on October 12, the trial court again summarily revoked appellant's probation. The following week, i.e., on October 18, appellant denied the charged probation violation. However, at a hearing held on November 7, the trial court held that appellant had, indeed, violated his probation.

Based on this record, appellant was interviewed by a representative of the Solano County Health and Human Services Department's Forensic Alternative Community Treatment (FACT) program. However, appellant initially declined the interview and stated that he was "completely opposed" to participation in the program. As a result, he was declared not to be a candidate for that program. Nonetheless, the Solano County Probation Department made a "guarded recommendation" that probation be reinstated and appellant referred for substance abuse treatment.

At a sentencing hearing held on December 28, the court specifically noted appellant's declination to participate in the FACT program and his prior poor performance while on probation. The court noted the probation department's "guarded recommendation" for reinstatement of probation, but stated it had "substantial reservations" concerning that recommendation in light of those considerations.

Appellant's counsel suggested to the trial court that "some of [appellant's] mental health issues" are what was causing "his resistance to the FACT treatment" and urged that, if the court "was going to sentence him on this somewhat mitigated case" that it give him the low term.

The prosecutor, referencing the 2010 San Diego Probation Department report, argued that the midterm was more appropriate. In so doing, she stated that this was "based primarily upon his prior performance on probation. He was granted summary probation a number of times as well as formal probation. Then he violated all but one of those grants by committing a new offense and by reoffending."

The court determined to sentence appellant to the midterm, with the 424 days of credits noted above. In so doing, it stated: "In light of the defendant's decision to opt out of treatment through the Forensic Assertive Community Treatment program, it does not appear to the Court there is any realistic probability that the defendant is going to successfully complete probation. [¶] I'm going to deny a further grant of probation in this matter. I reviewed the defendant's criminal history and in considering the circumstances of this offense, I'm going to find that there are neither aggravating nor mitigating circumstances that outweigh the other. [¶] The defendant does have—this represents his second felony conviction. He has already served a year in the county jail. [¶] Further, the conviction for assault by means to produce great bodily injury, he was on a number of grants of probation when this offense occurred."

Appellant filed a timely notice of appeal on January 12, 2012.[3]

## III. DISCUSSION

The law is clear regarding the standard of review of a case such as this. As our Supreme Court stated in *People v. Rodriguez* (1990) 51 Cal.3d 437 (*Rodriguez*): "Section 1203.2(a) states that a 'court may revoke . . . probation *if the court, in its judgment, has reason to believe* that the [probationer] has violated any of the conditions of . . . probation . . . or has subsequently committed other offenses . . . .' (Italics added.) It has been long recognized that the Legislature, through this language, intended to give trial courts very broad discretion in determining whether a probationer has violated probation. (See, e.g., *People v. Lippner* (1933) 219 Cal. 395, 400 ['. . . only in a very extreme case should an appellate court interfere with the discretion of the trial court in the matter of denying or revoking probation. . . .']; *People v. Martin* (1943) 58 Cal.App.2d 677, 683-684 ['[N]o particular source, manner or degree of proof is required by statute.'].) [¶] Our

[3] The notice stated, incorrectly, that the appeal was from an order denying probation under section 1237, subdivision (b). Actually, what was being appealed was the original judgment and the sentence imposed under it; we can and will construe the notice of appeal accordingly. (See *People v. Avery* (1986) 179 Cal.App.3d 1198, 1201, fn. 5.)

decision in *In re Coughlin, supra,* 16 Cal.3d 52, continues to read section 1203.2(a) as conferring great flexibility upon judges making the probation revocation determination." (*Rodriguez, supra,* 51 Cal.3d at p. 443.)

Nothing has changed regarding this standard of review since the *Rodriguez* decision. Thus, in *People v. Downey* (2000) 82 Cal.App.4th 899, 909-910, our colleagues in the Second District wrote: "Sentencing choices such as the one at issue here, whether to reinstate probation or sentence a defendant to prison, are reviewed for abuse of discretion. 'A denial or a grant of probation generally rests within the broad discretion of the trial court and will not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary or capricious manner.' [Citation.] A court abuses its discretion 'whenever the court exceeds the bounds of reason, all of the circumstances being considered.' [Citation.] We will not interfere with the trial court's exercise of discretion 'when it has considered all facts bearing on the offense and the defendant to be sentenced.' [Citation.] [¶] Here, we cannot find that the trial court abused its discretion in refusing to reinstate probation and in sentencing appellant to prison. It is clear that the trial court did not abandon its role as an impartial judicial officer, and to the extent appellant asserts judicial bias, this claim is waived for failure to raise an appropriate objection in the trial court. [Citation.] The trial court considered appellant's history, the arguments of counsel, and the reports submitted at sentencing. It was not, however, required to follow the recommendations in those reports. [Citations.] The court gave a lengthy and reasoned explanation for its sentence choice, resting the decision not to again reinstate probation on appellant's demonstrated lack of commitment to carrying out the terms and conditions of his probationary grant and the need to protect appellant's and the public's safety. Nothing in the record suggests, as does appellant, that the trial court's sentence choice was influenced by media criticism that the trial court was 'being too soft' on appellant. Its determination that a prison term was required might reflect the same frustration that any other judicial officer might have felt and the decision is one which any other judicial officer might well have made under the same circumstances; it reflects no personal animus toward appellant. In the absence of any

showing that the court's decision was arbitrary or capricious, we will uphold it on appeal." (See also *People v. Jones* (1990) 224 Cal.App.3d 1309, 1315-1316.)

Appellant argues that, because the Solano County Probation Department had made a "guarded recommendation" for continued probation for appellant, the trial court erred in not following that recommendation. He also urges that the record shows him to be a "low-level offender" who should be given "community based punishment" of the sort authorized by section 17.5, subdivision (a)(8).

We disagree with these arguments. Most importantly, we find nothing approaching an abuse of discretion in the trial court's handling of this matter, and especially not in its decision to sentence appellant to the midterm for the original burglary offense rather than keeping him on probation.

There are multiple reasons in appellant's legal history and the record before us justifying this conclusion. First of all, and as noted above, appellant's 2009 burglary conviction was his second felony conviction. He had an earlier felony assault conviction in 2001, and also had three misdemeanor convictions. The trial court was both aware of this history and noted it on the record before announcing its sentencing decision on December 28.

Additionally, after both his 2001 and his 2009 felony convictions, appellant's performance on probation was extremely poor. The trial court specifically referred to this reason in denying continued probation, and it was factually correct.

Specifically, according to the San Diego court's records, before his felony conviction there in 2001 appellant had been granted probation after the first of his misdemeanor convictions, but that probation had been revoked three times and he was found to be in violation of probation one additional time. Further, after his 2009 felony conviction in San Diego and his move to Solano County, he was found to have again violated probation at least twice, i.e., in May and October 2011.

The trial court correctly recognized that some of appellant's behavioral problems stemmed from his "mental health issues", i.e., bi-polar disorder. But, regarding that, the court also had before it a recent report that noted that appellant conceded he had been

"taking in excess" at least one of the drugs prescribed for him for that condition. But perhaps a more significant premise underlying the trial court's decision was that, per the probation department, appellant was "uninterested and unwilling to participate in FACT." At the same time the probation department was making its "guarded recommendation for reinstatement of probation," it also conceded that "[i]t is unknown why the defendant was unwilling to participate in the FACT program as it was hopeful that he would benefit from the additional mental health services that would be provided including substance abuse treatment and assistance with living arrangements."

At the sentencing hearing on December 28, the trial court specifically acknowledged that "there are mental health issues here" and that two different county probation departments "have tried to work with the defendant and address these issues, and the defendant is making the decision not to participate in further mental health treatment. That's his right. He has a right to do that."

Nonetheless, in the words quoted above (see *ante*, pp. 3-4), the trial court determined, notwithstanding the "guarded" recommendation of the probation department, to sentence him to the midterm of two years. In so doing, the trial court did not consider appellant's previous waiver of his custody and conduct credits and, instead, gave him the full 424 days, noting that because of these credits, appellant "will do less than six months and he will be finished with the system."

There was clearly no abuse of discretion in this ruling.

## IV. DISPOSITION

The judgment, including the sentence imposed, is affirmed.

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Haerle, J.

We concur:

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Kline, P.J.

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Richman, J.